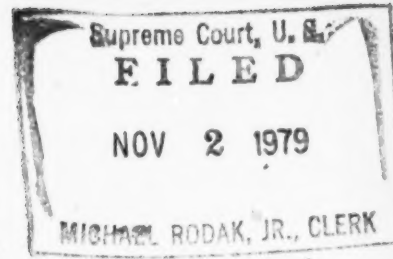


IN THE  
**Supreme Court  
of the United States**



October Term, 1979

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No. **79-710**

---

**Jeannine Honicker,**  
*Petitioner,*

v.

**Joseph M. Hendrie, Victor  
Gilinsky, Richard Kennedy,  
Peter Bradford, John Ahearne,**  
**United States Nuclear Regulatory Commission,**  
*Respondents.*

---

**PETITION FOR A WRIT OF CERTIORARI  
TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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Joel Kachinsky  
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156 Drakes Lane  
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**PETITION FOR A WRIT OF CERTIORARI  
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The petitioner, JEANNINE HONICKER, prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Sixth Judicial Circuit rendered in these proceedings on August 7, 1979.

**OPINIONS BELOW**

The opinion of the court of appeals, as yet unreported, appears at Appendix A, *infra*, p. A-1. The memorandum opinion of the district court, cited by the court of appeals, is published in 465 F.Supp. 414 (M.D.Tenn. 1979) and appears at Appendix A, *infra*, p. A-2.

**JURISDICTION**

The judgment of the court of appeals was entered on August 7, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §§1254(1), 1651(a), and Supreme Court Rules 19(1)(b), 30, and 31(1),(2). Jurisdiction is also founded upon the Constitution of the United States, Article III, Section 2, and Amendments I, IV, V, IX, and X.

**QUESTION PRESENTED**

Whether the doctrine of primary jurisdiction will necessarily preclude emergency equitable relief in district court, when an individual citizen offers substantial evidence that the federal agency charged with the duty to protect that individual has so failed in its duty as to create a situation of imminent peril.

**CONSTITUTIONAL PROVISIONS INVOLVED**

The constitutional provisions involved are set out in relevant portion in Appendix B, *infra*, p. B-1. The provisions involved are the following:

Article I, Section 8,  
Article II, Section 3,  
Article III, Section 2  
Article IV, Section 2  
Article VI, Section 2  
Amendments I, IV, V, IX, X, and XIV

**TREATIES INVOLVED**

The treaties of the United States involved are set out in relevant portion in Appendix B, *infra*, p. B-2. The treaties involved include:

The Nuremberg Principles  
The United Nations Universal Declaration of Human Rights  
The United Nations International Covenant on Civil and Political Rights  
The United Nations International Covenant on Economic, Social, and Cultural Rights  
The Helsinki Agreement

## STATUTES INVOLVED

The statutes involved are set out in relevant portion in Appendix B, *infra*, p. B-3. These statutes include the following:

5 U.S.C. §702

28 U.S.C. §§1331, 1343, 1361, 2342

42 U.S.C. §§1983, 2011 *et seq.*, (2012(e), 2201(i) and 2239)

10 C.F.R. §§19.30, 50.35.

45 C.F.R. §46.109

## STATEMENT OF THE CASE

This is an appeal by Jeannine Honicker, a citizen of Nashville, Tennessee, from an order by Judge L. Clure Morton, Chief Judge of the Middle District of Tennessee, dismissing her case against five named federal Commissioners for lack of subject matter jurisdiction.

Jeannine Honicker is the mother of four children. In 1975, her youngest daughter, Linda, experienced leukemia, a cancer of the immune system which is almost always fatal. In the course of learning about leukemia, Jeannine Honicker learned that leukemia is one disease which has been shown to be caused by radiation. According to health physicists, a doubling of the spontaneous rate of leukemias might be one price the world would pay for the use of nuclear energy. As she researched more, Jeannine Honicker learned that it is the policy of the Nuclear Regulatory Commission to license the operation of the nuclear fuel cycle at the cost of a number of present and future deaths from cancer, leukemia, and birth defects. She obtained NRC documents which set this cost as high as 100 eventual cancers for each day the nuclear fuel cycle operates as presently licensed.

As a mother who had learned the meaning of leukemia first hand, and as a concerned citizen, Jeannine Honicker challenged the radiation protection policy of the United States by petitioning the U.S. Nuclear Regulatory Commission to take immediate action to redress a condition of imminent peril which it had created.

When immediate action was denied, Mrs. Honicker petitioned for review by the Court of Appeals of the District of Columbia. Her petition for review was dismissed on December 21, 1978, *Honicker v. NRC*, 560 F2d 1207; *reh. denied*; *cert. denied*, 99 S.Ct. 1995, 60 L.Ed.2d 374, 47 U.S.L.W. 3683 (April 16, 1979), because, the circuit court argued, NRC denial of emergency relief did not constitute a final order on her petition which would transfer statutory jurisdiction to the courts of appeals.

Simultaneously Mrs. Honicker appeared before the U.S. District Court for the Middle District of Tennessee, Nashville Division, seeking a temporary restraining order to preserve her civil rights. This order was denied on September 6, 1978, and interlocutory applications to the Sixth Judicial Circuit and to Justice Potter Stewart were subsequently denied.

On September 6, 1978, Mrs. Honicker also filed a complaint with the district court in Nashville seeking a preliminary and final injunction against the operation of the nuclear fuel cycle to the detriment of her rights, privileges, and immunities under the U.S. Constitution. Jurisdiction was claimed under 42 U.S.C. §1983, 28 U.S.C. §§1331, 1361, 5 U.S.C. §702, the U.S. Constitution, and by the powers of equity. This complaint appears at Appendix C, *infra*.

Mrs. Honicker was given a partial evidentiary hearing on October 2, 1979, on her motion for a preliminary injunction, but testimony was curtailed before a full statement of her case, and before she had an opportunity to establish the NRC's true position through cross-examination of its expert witnesses. On January 12, 1979, the district court dismissed her complaint for lack of subject matter jurisdiction because, the court argued, the NRC had primary jurisdiction over the subject matter and agency review could be had with the court of appeals at some future time.

On August 7, 1979, the Sixth Circuit Court of Appeals affirmed the judgment of the district court and denied Mrs. Honicker's motion for injunctive relief.

## REASONS FOR GRANTING THE WRIT

I. Failure to exhaust an agency process does not preclude redress by the courts of the United States at the very instant that constitutional rights are violated.

### The Radiation Danger

Routine and unplanned releases of radiation from each licensed facility in the federally licensed nuclear fuel cycle have been estimated by the U.S. National Academy of Sciences (NAS or Academy),<sup>1</sup> the Environmental Protection Agency (EPA),<sup>2</sup> the Nuclear Regulatory Commission (NRC or Commission)<sup>3</sup> and other authorities<sup>4</sup> to result in a number

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<sup>1</sup>National Academy of Sciences, Advisory Committee on the Biological Effects of Ionizing Radiations, *The Effects on Populations of Exposure to Low Levels of Ionizing Radiation*, (BEIR I) 1972, (BEIR III) 1979; Committee on Science and Public Policy, *Risks Associated With Nuclear Power: A Critical Review of the Literature*, 1979; Academy Forum, *Nuclear Radiation: How Dangerous Is It?*, September 27, 1979. The National Academy of Sciences is an honorary society created by President Lincoln and Congress in 1863 which examines matters of interest to the government of the United States.

<sup>2</sup>Environmental Protection Agency, 520/4-77-005, *Considerations of Health Benefit-Cost Analysis For Activities Involving Ionizing Radiation Exposure and the Alternatives* (BEIR II), 1977; 520/4-78-003, *Radiation Protection Activities 1977*, p.27, 1978; ORP/CSD-76-2, *Estimate of the Cancer Risk Due to Nuclear Electric Power Generation*, 1976 (Plaintiff's Exhibit 13); 520/4-76-016, *Environmental Radiation Protection Requirements For Normal Operations of Activities in the Uranium Fuel Cycle*, 1976; 520/4-76-017, *Environmental Analysis of the Uranium Fuel Cycle*, 1976.

<sup>3</sup>Nuclear Regulatory Commission, NUREG-0002, *Generic Environmental Statement on the Use of Recycle Plutonium in Mixed Oxide Fuel in Light Water Cooled Reactors*, 1976 (Plaintiff's Exhibits 6 & 7); NUREG-0511(15.2.3), *Draft Generic Environmental Impact Statement on Uranium Milling*, 1979; NUREG-0332, *Health Effects Attributable to Coal and Nuclear Fuel Cycle Alternatives*, 1977; ASLB-STN-50-488-490, *Partial Initial Decision, Environmental Consequences of the Uranium Fuel Cycle*, 1978 (Defendants' Exhibit 2); STN-50-488-490, *NRC Staff's Supplementary Findings Relating to the Health Effects of Radon-222 Released by the Uranium Fuel Cycle*, 1978; *Federal Defendants' Supplemental Response to Motion for Expedited Consideration*, Attachment, *NRC Staff Response to the Jeannine Honicker Petition* (p.14, table 5), 1978; Statement of Robert Minogue, Director, Office of Standards Development, to the Senate Subcommittee on Nuclear Regulation, April 10, 1978, in *NRC Authorizations for Fiscal Year 1979*, Ser.No. 95-H56, p.59, 1979.

<sup>4</sup> Department of Health, Education, and Welfare, *Report of the Interagency*

of adverse health effects including premature deaths and future genetic injuries to citizens of the United States and foreign nationals. Reasonable estimates of these effects range from one to several hundreds for the radiological commitment of one nuclear reactor for one year.<sup>5</sup>

At the present time the United States produces fuel for more than seventy commercial reactors. In 1978, these reactors provided some 51,000 megawatts to the national supply of electricity. No public policy provision has been made for either the elimination of the permanent radiological health impact or for the compensation of the vast majority of the victims of routine radiation releases, and in fact, the inability to segregate these injuries from the general human condition renders proof of causation and fair compensation impossible.<sup>6</sup>

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*Task Force on the Health Effects of Ionizing Radiation*, 1979; British Columbia Medical Assoc., *Health Dangers of the Nuclear Fuel Chain and Low-Level Ionizing Radiation*, 1979; Congressional Environmental Study Conf., et al, *Radiation Standards and Public Health*, Proceedings of a Second Congressional Seminar on Low-Level Ionizing Radiation, 1978; Bruland, et al, "Transfer of Organically Bound Radionuclides Through Food Chains to Man," IAEA International Symposium on the Biological Implications of Radionuclides Released from Nuclear Industries, 1979; Schmitz-Feuerhake, et al, "Estimation of Somatic Risks and Standards of the ICRP," Sixth International Conference on Radiation Research, Tokyo, 1979; Morgan, "Radiation Induced Cancer in Man," Statement to the Senate Subcommittee on Energy, Nuclear Proliferation, and Federal Services, March 6, 1979; Mancuso, et al, "A Cohort Study of the Cancer Risks from Radiation to Workers at Hanford by the Method of Regression Models in Life-Tables," 1979; Killough and Till, "Scenarios of <sup>14</sup>C Releases from the World Nuclear Power Industry from 1975 to 2020 and the Estimated Radiological Impact," *Nuclear Safety*, 19-5:602, 1978; Till, et al, "A New Look at <sup>99</sup>Tc Releases to the Atmosphere," *Health Physics*, 36:21, 1979; see also NRC ASLB-509, *Responses*, March 2, 1979.

<sup>5</sup>Respondents' estimates range from 2 cancer deaths per year, not considering radon gas effects (record below, *Addendum to Federal Defendants' Memorandums*, Attachment 2, p.14, table 5), to 400 eventual cancers per annual fuel requirement for each reactor from radon gas alone (memorandum of Walter Jordan, ASLB, Attachment 4 to *Affidavit of Albert Bates*, J.D., September 6, 1978).

<sup>6</sup>Interagency Task Force on the Health Effects of Ionizing Radiation, *Report of the Work Group on Care and Benefits*, 1979; Statement of Robert Minogue (note 3, *supra*), p.61; EPA-520/4-77-005 (note 2, *supra*), p.103.

## The Regulatory Protection

The Nuclear Regulatory Commission was established by Congress for the stated purpose of regulating the utilization of atomic energy to the maximum extent consistent with the common security and with the health and safety of the public.<sup>7</sup>

No authorization was given by Congress--and, it shall be argued here, that no authorization *could be* given by Congress--to utilize atomic energy to provide electricity for some members of the public at the expense of the lives, health, and personal security of other members of the public, including the heirs of present peoples.

It is the frequently stated policy of the Commission, however, to balance this cost in loss of public health and safety in present and future generations against a present-day dollar value of nuclear-generated electricity and to license the operation of the nuclear fuel cycle at the cost of several thousands--even millions--of eventual health effects.<sup>8</sup>

<sup>7</sup>42 U.S.C. §§2013(d), 2133, 2201.

<sup>8</sup>At the House Subcommittee on Health and the Environment's hearings on February 26, 1979, Congressman Don H. Clauson asked Respondent Joseph M. Hendrie:

MR. CLAUSON: "Well, what is an acceptable risk? How do you define an acceptable risk?"

MR. HENDRIE: "If I had some way of detailing with full precision, Mr. Clauson, your daily risk and mine, or our average life risk, I would want the contribution to that from nuclear power technology to be at most a percent or two."

It should be noted here that a two percent increase in the risk of cancer would bring about 7,000 added cancers in the U.S. annually. This is not an idle interpolation of the Commissioner's remarks; the question of what percentage of the population it would be acceptable to damage has been discussed within the Commission since at least the late 1950s. A meeting of A.E.C. scientists in 1957, for instance, postulated that nuclear activities might result in a 20% increase in the spontaneous mutation rate and increase bone cancers 20%, but found that to be "acceptable" because the change would be difficult to detect. Advisory Committee on Biology and Medicine, *Minutes*, January 16-19, 1957.

Whether the actual effect of ionizing radiation at the exposure level associated with the nuclear fuel cycle could be expected to have public health consequences was addressed by Dr. Edward Radford, Chairman of

This enormous loss of life and health is said by the Commission to be an "acceptable risk" in exchange for the benefits of additional electricity.

the National Academy's Committee, in testimony to the House Subcommittee on Health and the Environment on February 8, 1978:

"An annual whole-body dose of 25 millirem per year from environmental exposure would give about 0.8 to 1.5 (percent) increased cancer risk, which is approximately the one percent I indicated with some degree of uncertainty. Thus the new 25 millirem per year general environmental exposure, which is the new EPA standard proposed, I believe, is consistent with this view."

Committee on Interstate and Foreign Commerce, *Effect of Radiation on Human Health* Volume 1, Hearings, Serial No. 95-179 (1978), p. 732, excerpted in *Affidavit of Albert Bates, J.D.*, September 6, 1978. Even when challenged by licensing intervenors as to the significance of this "acceptance" over the course of the future, the NRC has steadfastly adhered to its historical policy. The Atomic Safety Licensing Board, in a *Partial Initial Decision* in Perkins Units 1,2, and 3 cited by the Respondents (district court exhibit 3) held:

"In response to the Commission's directives...this Board has carefully considered the releases of radon-222 associated with the uranium fuel cycle and the health effects that can reasonably be deemed to be associated therewith, and concludes that such releases and impacts are insignificant in striking a cost-benefit balance for the Perkins Nuclear Power Station."

The word "insignificant" is used here to mean that the health effects of radon can be kept to a small percent of the spontaneous rate over a very long period of time. But the intervenors asserted that if the full potential for harm from radon were actually addressed, the number of eventual health effects would have to be set at some 230,000,000 over the millenia to come from the uranium fuel requirement for this one power station during its operating life. ALSB-509, *Responses*, March 2, 1979.

As the House Committee on Government Operations in its report, *Nuclear Power Costs*, H.R. No. 95-1090, at p. 11, observed:

"It could be argued, as Doctor Jordan indeed does, that the number is 'insignificant' using his word compared to the number of deaths caused by the presence of radon in the natural background environment. But there is a major fallacy in this contention. The radon in the tailings results from the activities of man and could be prevented. The accelerated radon release does not stem from the evolutionary process of nature.

"These effects, however, are not immediately observable. Therefore, the nuclear industry argues that nuclear power is safe.

## The Imminent Peril

That radiation is a direct and present injury is not seriously disputed. As Chief Justice Burger wrote in *Duke Power Co. v. Carolina Environmental Study*, 438 U.S. 59, 98 S.Ct. 2620, 2631, 57 L.Ed.2d 595 (1978):

"...the emission of non-natural radiation into appellees' environment would also seem a direct and present injury given our generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about the health and genetic consequences of even small emissions like those concededly emitted by nuclear power plants."

The Nuclear Regulatory Commission has estimated that radiation emanating from background sources results in 2,000 to 9,000 cancers in the U.S. each year.<sup>9</sup> While a recent report to EPA from the National Academy might elevate this figure,<sup>10</sup> it is sufficient to observe that the millions of curies (a curie is a quantity of radioactivity corresponding to the radioactive level of one gram of radium, or 37 billion disintegrations per second) which are being casually released annually to the world environment by NRC licensees will cause an elevation in the rate of radiation-induced diseases

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"Subcommittee witness Illinois Attorney General William Scott put it this way: '...on the whole problem of the storage of hazardous wastes, (the government thinks) of it so far in terms of...some vague idea of thorium dust, spent fuel rods, instead of thinking of people with birth defects, brain damage, people dying horrible deaths of cancer.

'...If people who were exposed to...radioactivity would all of a sudden drop over right away, then you could relate to it. But the fact that the radioactivity will cause bladder cancer 15 or 25 years from now, does not immediately surface, so the problem is not that dramatic.

'...We have a time bomb ticking already.'"

<sup>9</sup>NRC Staff Response to the Jeannine Honicker Petition, note 3.*supra*, p.14, table 5.

<sup>10</sup>To 6,000-18,000 new cancers annually, using the BEIR III, 1979, estimate of relative risk to both sexes from continuous exposure to low-dose, low-LET radiation.

and will persist for millenia.<sup>11</sup> Because microscopic nuclides cannot be recovered once released to the biosphere, this damage is irreversible.

## The Duty of the Respondents

The Commission's present--and historical--philosophy with regard to releases of persistent radioactivity has been to keep these routine and accidental releases as low as reasonably achievable (ALARA) while allowing latitude for the nuclear industry to develop.<sup>12</sup> On August 23, 1979, the NRC's Director of Nuclear Reactor Regulation, Mr. Harold Denton, expressed the NRC's radiation protection policy to The President's Commission on the Accident at Three Mile Island in this way:

MR. TAYLOR: "It would seem to me that if one is indifferent to whether the industry survives or not and you have this very serious charge (from Congress) on

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<sup>11</sup>At the preliminary evidentiary hearing before the district court, expert witness John W. Gofman, M.D., Ph.D., the co-discoverer of U-233, testified:

"Nuclear power is one of the greatest experiments being conducted on the human species and the biosphere in general. It's sort of a game of chance.

"We create--no one can argue, it's just an arithmetic exercise to figure out the quantity of radioactivity we produce--and the name of this whole experiment is, when you consider the enormous complexity of the fuel cycle, all of the steps that must be gone through, chemically, transportation, and otherwise, everything hinges on what percentage of this great quantity of radioactivity gets out.

"If the percentage is a trillionth of the amount you make, only a small number of people would die.

"If the percentage is a thousandth, we will have a cancer disaster of great magnitude, and a genetic disaster.

"So it's a question of what we'll experience over the years under all circumstances of acts of God, tornadoes, malevolence, human error, machine malfunction, and what will be the percentage that gets out? That's an experiment and we don't know the answer."

(TR p. 31)

<sup>12</sup> Per ICRP Publication No.26, 1978, adhering to the philosophy first stated in ICRP No.2, 1966, "It is felt that this level provides reasonable latitude for the expansion of atomic programs in the foreseeable future." See also the Statement of Robert Minogue, note 3.*supra*.

safety, the only thing you can come out with is you must not have any radioactivity."

MR. DENTON: "No. It is not none. I think at times society perhaps expects us to follow the Delaney clause type principle<sup>13</sup> that (there be) no releases of radioactivity. My understanding is, I follow *no undue risk*, or a *reasonable assurance of no undue risk*, so I don't operate on a, uh, our statute is not a zero risk statute but a lack of undue risk, so if I had to make a finding there would be no radioactivity released from a plant I obviously couldn't make that finding."<sup>14</sup>

While admitting that the nuclear fuel cycle is irradiating the public (including Mrs. Honicker)<sup>15</sup> and that this radiation may result in health effects at even the lowest doses<sup>16</sup> and that the most likely effect will be numerous diseases and premature deaths among U.S. citizens and foreign nationals over long periods of time,<sup>17</sup> the Commission is willing to

<sup>13</sup>The Delaney clause is an amendment to an Act of Congress which prohibits known cancer-causing agents from being added to food.

<sup>14</sup>The standard of "reasonable assurance of no undue risk to public health and safety" is derived from section 182(a) of the Atomic Energy Act (42 U.S.C. §2235) as specified in 10 CFR §50.35(a) (see Appendix B, *infra*). However this standard only applies during plant construction. The standard for nuclear plant operation is far more stringent:

"...reasonable assurance that the health and safety of the public will not be endangered by operation of the facility...."

10 CFR §50.35(c)(2); and note *Power Reactor Development Co. v. Electrical Union*, 367 U.S. 396, 406, 81 S.Ct. 1529, 6 L.Ed 2d 924, 931 (1961).

This is a far higher standard than is placed upon any other method of electrical production, and reflects a federal concern associated with the uncertainties of nuclear power development. The language of the law is not tentative nor discretionary, as in "no undue risk," but affirmative and mandatory; "assurance that the health and safety of the public will not be endangered." There can be no room in this standard for human experimentation, to say nothing of willful human sacrifice.

<sup>15</sup>Federal Defendants' Answers to Plaintiff's Interrogatories, #9, footnote 6 to the Memorandum of the district court, Appendix A, *infra*.

<sup>16</sup>Note 3., *supra*.

<sup>17</sup>On page S-23 of Volume 1 of NUREG-0002 (GESMO, note 3, *supra*), the Commission states:

"It can be seen that the estimated number of added cancer mortalities in the United States ranges between 1,100 and 1,300 for the three recycle options. The estimated number of

assert publicly that these effects are not "undue" or "unreasonable," but are "acceptable."

added genetic defects ranges between 2,200 and 2,400."

(Plaintiff's Exhibit 6)

In a memorandum transmitted to the Commission on September 21, 1977, Dr. Walter Jordan of the Atomic Safety Licensing Board stated:

"Deaths in future generations due to cancer and genetic effects resulting from the radon required to fuel a single reactor for one year can run into the hundreds."

(Affidavit of Albert Bates, J.D.)

In September, 1978, a study prepared for the Department of Energy was published by the NRC as "Scenarios of <sup>14</sup>C Releases from the World Nuclear Power Industry from 1975 to 2020 and the Estimated Radiological Impact," in *Nuclear Safety*, 19-5:602. In this NRC publication the following statement appeared:

"The estimates of cumulative potential health effects based on integration over infinite time (effectively 46,000 years or about 8 half-lives of <sup>14</sup>C) are as follows: 110,000 cancers and 75,000 genetic effects from the pessimistic scenario; 21,000 cancers and 14,000 genetic effects from the optimistic scenario; 22,000 cancers and 15,000 genetic effects from the intermediate scenario; 100,000 cancers and 68,000 genetic effects from the <sup>14</sup>C formed in nature between 1975 and 2020; and 380,000 cancers and 250,000 genetic effects from the <sup>14</sup>C formed by the detonation of nuclear explosives from 1945 to 1975."

(Addendum A to Appellant's Brief, Sixth Circuit)

The NRC Staff Response to the Jeannine Honicker Petition stated (at p.49):

"...even if low level radiation can induce cancer and genetic effects, future discoveries in prevention and cure of cancer, and genetically related diseases and genetic engineering may negate many of these effects."

(Attachment to Federal Defendants Supplemental Response to Motion for Expedited Consideration)

The NRC Staff Responses to Questions to the Staff Relevant to the Honicker Petition stated (at pp.2-4):

"...it can be reiterated that the staff believes that the quantitative health effect values it has presented are acceptable.

"...other risks are apparently acceptable, perhaps fatalistically, in that lives lost in construction accidents, transportation accidents, mine accidents, etc., which result in much greater numbers of real and immediate deaths than the latent potential cancer deaths due to radiation are relatively unprotested....

"The certainty of radiation caused cancer deaths, at the levels

However, the petitioner takes a much different view, as is reflected in the record below:

"Mrs. Honicker has a cognizable legal right to her life, to her health, to her freedom, and to her peace of mind. She has a right to breathe unpoisoned air, drink unpoisoned water, till unpoisoned soil, grow unpoisoned food, procreate undamaged children, and nurture them in a safe environment. If she is to be deprived of any of these rights, she has a right to due process of law--to be confronted by her accusers and to have a trial by a jury of her peers. These are rights she has not willingly surrendered. These are rights which are cognizable by law and have evolved since the dawn of civilization. No federal agent may step in and remove these rights and then claim immunity from judicial review.<sup>18</sup>"

## **II. This case presents recurring questions as to the intent of Congress and the meaning of the Constitution respecting the division of jurisdiction between the federal courts and the administrative agencies.**

### **Statutory Jurisdiction**

The district court erred by holding that it lacked subject matter jurisdiction, because 5 U.S.C. §702, 28 U.S.C. §§1331, 1343, 1361, and 42 U.S.C. §1983 incorporate the provisions of the Atomic Energy Acts.

28 U.S.C. §2342 and 42 U.S.C. §2239 (b) provide that final orders of the Nuclear Regulatory Commission are exclusively reviewable in the courts of appeals. Thus the district court held that statutory exclusion barred lower courts from exercising jurisdiction.

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calculated for the nuclear fuel cycle, would not change the staff's conclusion or recommendation regarding the Honicker Petition, since the number of deaths and their effective societal cost are far outweighed by the benefits.

"...Furthermore, in a real sense, there is some choice regarding the risk of nuclear power, since an individual can select his living location so as to be in a lower risk group than those living near a power plant."

(Declassified September, 1979)

<sup>18</sup>Brief for Appellant to the Sixth Circuit, p. 26. See also para.16 of the Complaint, Appendix C., Plaintiff's Memorandum In Support of Her Application For A Preliminary Injunction, October 2, 1978, p.22, and Plaintiff's Brief on the Jurisdiction of the District Court to Hear Her Cause, October 17, 1978, p.26.

While statutory jurisdiction lies with the courts of appeals for review of "all final orders" in proceedings brought "under the Act" (28 U.S.C. §2239), the present action was not instituted under the Atomic Energy Act, and as the District of Columbia Circuit has already held in *Honicker v. NRC, supra*, Mrs. Honicker's attempt at emergency administrative relief "under the Act" has yet to ripen to "final order" and is not therefore the subject of courts of appeals exclusive jurisdiction.

Until such time as the statutory jurisdiction of the courts of appeals arises, "non-statutory" avenues for immediate, equitable relief must apply. Jeannine Honicker's *Complaint* concisely stated a claim for "non-statutory" jurisdiction:

"1. Jurisdiction for this action is founded upon the existence of a Federal question. The action arises under section 1983 of title 42 of the Code of the United States (Civil Rights), section 1361 of title 28 (Mandamus), and section 1331 of title 28 (Constitution, laws and treaties of the United States). The amount in controversy exceeds \$10,000.

\* \* \*

"4. Acting under color of law, the defendants have engaged in a course of conduct which deprives the plaintiff of her rights, privileges, and immunities, and has deprived other human beings of their lives and physical integrity."

In *Leedom v. Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d. 210, this Court held:

"If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control."

The doctrine of primary jurisdiction cannot be used to deprive a citizen of her rights. It cannot be used to remove the right to *speedy* due process if the privileges and immunities of citizenship have been placed in jeopardy. A statutory exclusion which infringes upon a right provided by the Constitution is void, being beyond the scope of the limited authority of Congress.

## Mandamus

The federal courts have never relinquished jurisdiction to require the performance of federal duties. The Mandamus statute, 28 U.S.C. §1361, confers jurisdiction upon the district court to compel the federal respondents to execute a clear, non-discretionary duty, that is, to protect the public health and safety and to uphold the federal Constitution. This duty is owed to the petitioner and to the public and is defined by the Atomic Energy Act, 42 U.S.C. §§2011, 2012, 2013 and the U.S. Constitution.

Title 10 of the Code of Federal Regulations, §19.30, provides that an injunction or other court order may be obtained prohibiting any violation of the Atomic Energy Act, as amended. Is this grant of jurisdiction by the NRC--giving federal courts express jurisdiction over nuclear subjects--only to be used at their permission, or may a private citizen institute such a proceeding even when the NRC disapproves?

## Federal Questions

The district courts also have original jurisdiction whenever the matter in controversy arises under the Constitution, laws or treaties of the United States. Where equitable relief is sought in such a case, the jurisdiction is also conferred by 28 U.S.C. §1343.

"Non-statutory" actions obtain judicial review of agency actions primarily through 28 U.S.C. §1331, as was the intent of Congress. In *Gully v. First National Bank*, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936), this Court discussed the requirements for jurisdiction;

"To bring a case within the statute, a right or immunity created by the Constitution or the laws of the United States must be an element, and an essential one, of the plaintiff's cause of action.... The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another."

The question presented to the district court is whether the U.S. Constitution or the Acts or treaties of the United States protect the petitioner and other persons from involuntary

exposure to radiation from the nuclear fuel cycle. The question is one which requires an interpretation of the Constitution and other federal Acts.<sup>19</sup>

## Civil Rights

Under 42 U.S.C. §1983 and 28 U.S.C. §1343, every person acting under color of state laws or usages, who subjects any citizen to the deprivation of rights, privileges, or immunities, is liable for a suit in equity or other appropriate proceeding.

These statutes protect rights secured by the U.S. Constitution and the laws of the United States which are deprived under color of a statute, custom, or usage of any state or territory.

The NRC has, since its origin, entered into agreements of shared responsibility with many states, including the state where Mrs. Honicker resides. It is through the delegated authority, enabling statutes, and officers and agents of the various states that the NRC has been permitted to act, and, in so acting, has deprived Mrs. Honicker of her rights.

Moreover, as this Court has recently asserted in *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895, 914 (1978):

"To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head."

Whenever the right to personal security guaranteed in the Fourth and Fifth Amendments of the Constitution is abridged by federal officers, there is an implied cause of action under the Constitution. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Federal officers do not enjoy an absolute immunity from this kind of suit. All officers of the government, from the highest to the least, are creatures of the law, and are bound to obey it. *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803); *United States v. Lee*, 106 U.S. 196,

<sup>19</sup>Including the Treaties of the United States, particularly those recently incorporated by way of reference into the Helsinki Agreement between the United States and 34 other Nations on August 1, 1975, see Appendix B.

1 S.Ct. 240, 27 L.Ed. 171 (1882); *Scheuer v. Rhodes*, 416 U.S. 232, 239-240, 94 S.Ct. 1683, 40 L.Ed.2d 90, 71 Ohio Ops. 2d 474 (1974); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153, 47 Ohio Ops. 430, 26 ALR2d 1378 (1952); *U.S. v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039. The presence or absence of congressional authorization for suits against federal officials is relevant to the question of whether to infer a right of action for damages for a particular violation of the federal Constitution, but not to the question of immunity for federal officials. It is untenable to draw a distinction between suits brought under the Atomic Energy Act and suits brought under 28 U.S.C. §1331 or directly under the U.S. Constitution for the purpose of suggesting some sort of federal immunity. A higher degree of immunity from liability is not to be accorded to federal officials when sued for constitutional violation than is accorded to state officials when sued for the identical violation under 42 U.S.C. §1983. *Butz v. Economou*, *supra*. The applicable common law doctrines narrowly circumscribing jurisdiction must always yield to the paramount necessity of vindicating the principles of the Constitution.

**III. The exclusive jurisdiction of the executive to adjudicate matters of nuclear science does not preclude a citizen from directly appealing allegations of constitutional violations to the courts of the United States. To hold to the contrary would devalue the constitutional design of our tripartite system.**

The district court gave as its principal reason for dismissing this lawsuit the fact that the NRC was actively evaluating Mrs. Honicker's requested action.<sup>20</sup>

Yet more than sixteen months have passed since an emergency life-saving request was filed with the NRC. Others have fared worse: eight years have passed without a final rulemaking on whether to include nuclear accidents in environmental impact calculations; and five years have

<sup>20</sup>Since no exception to the exhaustion requirement is applicable in this case, plaintiff's failure to exhaust bars relief in this court."Memorandum, Appendix A.

passed without a final order on a petition to reduce the involuntary radiation exposure to fertile women. As Commissioner Peter Bradford recently lamented:

"Proceedings themselves can often be selectively embarked upon under regulatory frameworks that allow citizen petitions to languish for years while imposing firm deadlines on rate cases and licensing actions...Though it is not essential, it is very helpful to have the system reinforced by courts which defer copiously to agency expertise in the face of challenges from citizen groups...."<sup>21</sup>

What is to be the recourse of a citizen who awakens to the realization that as many as 100 murders are being committed by these federal agents every day? Is she constrained to petition the agents themselves to stop, and then to await their reply, no matter how long it takes? Or may she appear before the federal judiciary, whose doors are said to never close at any hour of the day? Is there no circumstance pertaining to the operation of nuclear power plants that would merit examination by a court of law immediately? Is there no possible situation of imminent peril in which a citizen could bypass the federal agency process and apply for more expeditious relief?

As Alexander Hamilton said,

"It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute *their* will for the will of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation

<sup>21</sup>Bradford, "The Nuclear Option, Did It Jump, Or Was It Pushed?" Speech, August 2, 1979.

and validity ought, of course to be preferred; or in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

\* \* \*

"This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill-humors which the arts of designing men, or the influence of particular conjunctures sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government and serious oppressions of the minor party in the community."<sup>22</sup>

Commissioner Bradford has admitted that,

"...all regulatory agencies wa ver between their civics textbook mission to protect some form of public interest and a far more unfortunate function of performing a gauzy illusion of protection across conduct the public would not tolerate if it did not think it was being protected by the regulators."<sup>23</sup>

yet the district court, in shielding the agency from review, stated,

"...this case implicates fundamental questions of national policy concerning the development of nuclear energy, and therefore it should be decided by the agency in which Congress has vested the power and discretion to make these important policy choices."<sup>24</sup>

It is because the fundamental questions of policy are of a profound moral and ethical nature and not in any vital sense technical or scientific that the petitioner needs to be afforded the opportunity to have her complaint heard by an impartial judiciary. The equitable powers of the district courts are adequate to acquire scientific opinions or to appoint special masters to adjudicate matters of scientific controversy. In

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<sup>22</sup>Hamilton, *The Federalist* No. 78, June 14, 1788, reprinted in *The Federalist Papers*, New American Library of World Literature, New York, 1961, at p. 467.

<sup>23</sup>*Op.cit.*, note 21.

<sup>24</sup>*Honicker v. Hendrie*, 476 F. Supp. 414, 419; *Memorandum*, Appendix A.

contrast, the Nuclear Regulatory Commission has no claim of special expertise as to matters of civil rights or constitutional law.

Nowhere under the Constitution is the NRC or any other division of our federal republic authorized to issue murder licenses in order to produce electricity or any other consumer goods. If the NRC believes it is all right to kill 100 persons to produce electricity for America, what about 1000? What about 100,000? At what point beyond the number 1 can we find a firm and absolute legal or philosophical reason to proscribe a limit? Once we have permitted the first planned civilian death under federal license have we not sacrificed a fundamental freedom our forefathers won for us?

If the courts should endow the Commission with exclusive primary jurisdiction over all complaints against these infringements whenever the Commission itself is involved, by what means are the rights of citizens to be regained?

The government of the United States is founded upon the essential liberty and dignity of the individual citizen, and the Constitution commands in mandatory language:

**"The right of the people to be secure in their persons...shall not be violated...."**

**"No person shall be...deprived of life, liberty, or property without due process of law...."**

## CONCLUSION

Whereas the court of appeals has rendered a decision on an important question of federal law in conflict with the Constitution of the United States, with treaties of the United States, and with applicable decisions of this Court, and has so far departed from the accepted and usual course of judicial and constitutional proceedings, and has sanctioned such a far departure by the district court, as to call for an exercise of this Court's power of supervision, therefore, a writ of certiorari should issue, directed to the Court of Appeals for the Sixth Circuit, bringing the matter before this honorable Court.

Respectfully submitted,

Jeannine Honicker,  
*Petitioner*

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November, 1979

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## APPENDIX A

No. 79-1132

### UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JEANNINE HONICKER,  
*Plaintiff-Appellant,*

V.

JOSEPH M. HENDRIE, VICTOR GILINSKY,  
RICHARD KENNEDY, PETER BRADFORD, JOHN  
AHEARNE, UNITED STATES NUCLEAR  
REGULATORY COMMISSION,  
*Defendants-Appellees.*

## ORDER

*Before: ENGEL and MERRITT, Circuit Judges; PECK, Senior Circuit Judge.*

Plaintiff appeals from the district court's order dismissing her suit for an injunction directing the Nuclear Regulatory Commission to revoke the licenses of all nuclear power facilities within the jurisdiction of the Commission. For the reasons set forth in the district court's thorough and well-reasoned memorandum opinion, published in 465 F. Supp. 414 (M.D.Tenn. 1979), we affirm the judgement of the district court granting defendant's motion to dismiss for lack of jurisdiction, and deny plaintiff's motion for injunctive relief in this court.

ENTERED BY ORDER OF THE COURT  
JOHN P. HEHMAN, *Clerk*  
August 7, 1979

*Issued as Mandate: August 28, 1979*

UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION

JEANNINE HONICKER	]		
	]		
	]		
vs.	]		NO. 78-3371-NA-CV
	]		
	]		
JOSEPH M. HENDRIE,	]		
ET AL	]		

M E M O R A N D U M

Plaintiff Jeannine Honicker brought this action seeking an injunction ordering defendants, members of the United States Nuclear Regulatory Commission (the NRC), to revoke the licenses of all nuclear fuel cycle facilities within the jurisdiction of the Commission. According to plaintiff, nuclear power production activities sanctioned by defendants pose an unavoidable health hazard to plaintiff and others that will cause United States citizens and foreign nationals to suffer disease and death in this and future generations. Plaintiff contends, therefore, that defendants' licensing of nuclear fuel cycle facilities deprives plaintiff and others of life without due process of law in violation of the United States Constitution and fails to assure adequate protection of the public health and safety in violation of

42 U.S.C. § 2011 *et. seq.* Prior to instituting this suit, plaintiff filed a petition with the NRC requesting emergency and remedial action by that body to grant essentially the same relief that plaintiff presently seeks in this court. The NRC denied the request for emergency relief but has been and is currently considering all other aspects of the case pursuant to appropriate sections of 10 C.F.R. pt. 2 (1978)<sup>1</sup> and the general supervisory powers of the NRC. At this juncture the court is faced with the question, presented by defendants' motion to dismiss, of whether or not the court has subject matter jurisdiction over this action. For the reasons hereinafter stated, the court has concluded that it does not.

First, plaintiff has failed to exhaust the available administrative remedies as required by the general rule that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 82 L. Ed. 638, 644, 58 S. Ct. 459 (1938); *See, e.g., Coalition for Safe Nuclear Power v. United States Atomic Energy Commission*, 463 F.2d 954 (D.C. Cir. 1972); *Concerned Citizens of Rhode*

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<sup>1</sup> In order to obtain the views and recommendations of its technical staff before taking any action, the NRC initially treated plaintiff's petition as an enforcement proceeding pursuant to 10 C.F.R. § 2.206 (1978), which allows any person to request the institution of a proceeding under § 2.202 to modify, suspend, or revoke a license, or for such other action as may be proper. After receiving the response of the NRC staff, the NRC concluded that plaintiff's petition primarily constituted a challenge to the adequacy of the NRC's regulations and licensing standards and that it should be addressed by the NRC itself consistent with 10 C.F.R. § 2.802 (1978) and the NRC's general supervisory powers. *See* Second Addendum to Plaintiff's Brief on the Jurisdiction of the District Court To Hear Her Cause, Exhibits 3-4 (letters of September 7, 1978, and December 6, 1978, to plaintiff from the Secretary of the NRC). 10 C.F.R. § 2.802 provides in pertinent part: "Any interested person may petition the Commission to issue, amend, or rescind any regulation."

*Island v. Nuclear Regulatory Commission*, 430 F. Supp. 627 (D.R.I. 1977); *Nader v. Ray*, 363 F. Supp. 946 (D.D.C. 1973). But see *Drake v. Detroit Edison Co.*, 443 F. Supp. 833 (W.D. Mich. 1978). When applicable, the exhaustion doctrine precludes a court from asserting jurisdiction over the controversy until the administrative process has been completed. See, e.g., *Concerned Citizens of Rhode Island v. Nuclear Regulatory Commission*, *supra*, 430 F. Supp. at 632. In the present case, both the Atomic Energy Act, 42 U.S.C. § 2239(a), and the regulations of the NRC, 10 C.F.R. §§ 2.200-2.206 (1978) and 10 C.F.R. § 2.802 (1978), allow "any person" to request the institution of a proceeding to revoke the licenses of nuclear fuel cycle licensees or to issue, amend, or rescind any regulations. Plaintiff has in fact availed herself of these administrative remedies by filing the petition for emergency and remedial action with the NRC that preceded this lawsuit, and the NRC is actively engaged in evaluating the petition. Under these circumstances, it is apparent that plaintiff has not exhausted the prescribed administrative remedy.

None of the exceptions to the exhaustion requirement that would excuse plaintiff's failure to exhaust are applicable to the facts of this case. Had plaintiff brought this suit to challenge the constitutionality of the basic statutes, the Atomic Energy Act of 1954<sup>2</sup> and the Energy Reorganization Act of 1974,<sup>3</sup> which authorize the NRC to regulate the development of nuclear energy, exhaustion might not be necessary. See 3 K. Davis, *Administrative Law Treatise* § 20.04 (1958). Instead, plaintiff relies upon the provisions of those acts to establish the statutory standard that she claims defendants have violated. Had the case presented a pure question of law, as plaintiff asserts it does, it would be cognizable in this court even in the absence of exhaustion, because the fact-finding expertise of the agency would be unnecessary for the resolution of the claim. See

K. Davis, *Administrative Law of the Seventies* § 20.01 (1976). The NRC's expertise, however, is necessary in this case to determine whether or not the alleged hazards of disease or death are created by the operation of the nuclear fuel cycle. Were the administrative remedy under consideration futile or inadequate, then the court could excuse plaintiff's failure to exhaust. See, e.g., *Spanish International Broadcasting Co. v. Federal Communications Commission*, 385 F.2d 615, 626 (D.C. Cir. 1967); *Nader v. Ray*, *supra*, 363 F. Supp. at 954. Pursuant to procedures established by the NRC, however, persons such as plaintiff may request the NRC to revoke the licenses of nuclear power producers, or to alter the agency's own regulations, and the NRC is expressly empowered to grant such relief. Since no exception to the exhaustion requirement is applicable in this case, plaintiff's failure to exhaust bars relief in this court.

Second, even if plaintiff had exhausted the available administrative remedies, this court could not assume jurisdiction to review the action of the NRC, because that jurisdiction is vested exclusively in the United States courts of appeal. See *Nader v. Ray*, *supra*, 363 F. Supp. at 954; *Wright, Miller, Cooper & Gressman*, 16 *Federal Practice and Procedure: Jurisdiction* § 3943 (1977). Pursuant to 42 U.S.C. § 2239 (b), final orders entered in either NRC license revocation or rulemaking proceedings are subject to judicial review in the manner prescribed in 28 U.S.C. § 2342(4) and the Administrative Procedure Act. The latter provision states that the form of proceeding for review of administrative action is "the special statutory review proceeding relevant to the subject matter in a court specified by statute. . . ." 5 U.S.C. § 703. This is an implicit reference to 28 U.S.C. § 2342(4), which provides that the court of appeals "has exclusive jurisdiction to enjoin, set aside, suspend (in whole or part), or to determine the validity of" orders of the NRC made reviewable by 42 U.S.C. § 2239. The only judicial forum provided by statute that is available to plaintiff is, therefore, the court of appeals. See, e.g., *Gage v. United States Atomic Energy*

<sup>2</sup>42 U.S.C. § 2011 *et seq.*

<sup>3</sup>42 U.S.C. § 5841 *et seq.*

*Commission*, 479 F.2d 1214, 1218 (D.C. Cir. 1973); *Paskavitch v. United States Nuclear Regulatory Commission*, 458 F. Supp. 216, 217 (D. Conn. 1978); *Concerned Citizens of Rhode Island v. Nuclear Regulatory Commission*, *supra*, 430 F. Supp. at 630; *Izaak Walton League of America v. Schlesinger*, 337 F. Supp. 287, 290 (D.D.C. 1971). But see *Drake v. Detroit Edison Co.*, 443 F. Supp. 833 (W.D. Mich. 1978). This exclusive statutory review mechanism also prevents plaintiff from following other avenues of so-called "non-statutory review" of administrative action in this court by invoking general jurisdictional statutes such as 28 U.S.C. § 1331 or § 1361. Nonstatutory review is available only in the absence of a specific statute authorizing review in a particular court. "Where Congress has provided an adequate procedure to obtain judicial review of agency action, that statutory provision is the exclusive means of obtaining judicial review in those situations to which it applies." *Memphis Trust Co. v. Board of Governors of the Federal Reserve System*, 584 F.2d 921, 925 (6th Cir. 1978) (citing *Whitney National Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 419-23, 13 L. Ed. 2d 386, 85 S. Ct. 551 (1965)). See, e.g., *Nader v. Volpe*, 466 F.2d 261 (D.C. Cir. 1972); *Sun Enterprises, Ltd. v. Train*, 394 F. Supp. 211 (S.D.N.Y. 1975). See generally Note, *Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals*, 88 Harv. L. Rev. 980 (1975). Jurisdiction in this court cannot be predicated upon any theory of judicial review of agency action.

Finally, plaintiff cannot circumvent the strict jurisdictional limits on judicial review of NRC action by arguing that her complaint is not a petition for review of agency action, but rather is a proceeding seeking *initial relief* in the courts. Even if this court did have subject matter jurisdiction over plaintiff's claim,<sup>4</sup> the doctrine of primary juris-

<sup>4</sup> Plaintiff has cited a number of statutes in an effort to establish the jurisdiction of this court over the present case. Of these, the only two that in principle might provide jurisdiction are the

diction would require that the court stay its hand until the "agency charged by Congress with the responsibility of regulating the subject matter has had an opportunity to apply its expertise to the question at issue . . . ." *Paskavitch v. United States Nuclear Regulatory Commission*, *supra*, 458 F. Supp. at 217. See, e.g., *Port of Boston Marine Terminal Ass'n. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 27 L.Ed. 2d 203, 91 S. Ct. 203 (1970); *Southern Railway Co. v. Combs*, 484 F.2d 145 (6th Cir. 1973). Application of this doctrine is particularly appropriate here. Determination of a highly complex and controversial<sup>5</sup> question of nuclear science, the effect on human health of the low level radiation exposure allegedly produced by the ordinary operation of the nuclear fuel cycle, would be crucial to an adjudication in this case. Certainly, expertise in the field of nuclear science would facilitate such a determination. The NRC possesses this expertise; the court does not. See, e.g., *Paskavitch v.*

federal question and mandamus jurisdictional statutes, 28 U.S.C. § 1331 and 28 U.S.C. § 1361, but in the present case these are supplanted by the exhaustion doctrine and the provisions for exclusive court of appeals review of NRC action. The All Writs Act, 28 U.S.C. § 1651, provides only for the power of a federal court to issue writs once its jurisdiction has been established, and does not of itself confer jurisdiction. See, e.g., *Sears, Roebuck and Co. v. NLRB*, 433 F.2d 210 (6th Cir. 1970); *Thompson Products, Inc. v. NLRB*, 133 F.2d 637 (6th Cir. 1943). None of the acts of which plaintiff complains were performed under color of state law for purposes of 42 U.S.C. § 1983, and so plaintiff cannot maintain this as a civil rights action pursuant to that statute. Finally, the judicial review provisions of the Administrative Procedure Act cited by plaintiff, 5 U.S.C. § 702 and § 706, do not provide an independent basis of jurisdiction, as the United States Supreme Court has recently made clear in *Califano v. Sanders*, 430 U.S. 99, 51 L.Ed 2d 192, 97 S. Ct. 980 (1977).

<sup>5</sup>At the hearing held on October 2, 1978, plaintiff's counsel conceded that a divergency of opinion exists among experts in the field concerning the amount of radiation exposure necessary to cause cancer or other deleterious health effects in human beings. Transcript at 120-21.

*United States Regulatory Commission, supra*, 458 F. Supp. at 217; *Nader v. Ray, supra*, 363 F. Supp. at 953. Furthermore, this case implicates fundamental questions of national policy concerning the development of nuclear energy, and therefore it should be decided by the agency in which Congress has vested the power and discretion to make these important policy choices. As stated recently by the United States Supreme Court:

Nuclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are not subject to reexamination in the federal courts under the guise of judicial review of agency action. Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment.

*Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. *beg.* at 519, 55 L. Ed. 2d 460, 488, 98 S. Ct. 1197 (1978). In light of this emphatic language approving the procedure Congress has selected to deal with the nuclear energy question, it seems inadvisable for this court to address the problem because the NRC, which is already considering the matter, has not yet made the factual findings or policy decisions necessary for the resolution of this case.

Plaintiff insists that defendants have admitted that an imminent peril to plaintiff's health and life exists as a result of the operation of the nuclear fuel cycle, and that therefore the only question facing the court is whether or not this hazard violates plaintiff's constitutional and statutory rights. If this assessment of the situation were accurate, the court would not feel constrained by the doctrine of primary jurisdiction and would not hesitate to act to protect plaintiff's rights. The statements upon which plaintiff relies

cannot, however, be characterized as admissions that ordinary fuel cycle activities will cause death or disease to plaintiff or any other persons.<sup>6</sup> An evaluation of the facts by the NRC is thus required to determine what health risk is present. The court therefore defers to the NRC, and because any final resolution of the matter by that agency is exclusively reviewable in the court of appeals, the court sees no reason not to dismiss this cause in its entirety.

An appropriate order will be entered.

(s) L. Clure Morton

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L. CLURE MORTON  
CHIEF JUDGE

RECEIVED FOR ENTRY

3:50 P.M.

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Jan. 12, 1979

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Julia B. Cross

Clerk

BY Barbara Blick

Deputy Clerk

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<sup>6</sup> Plaintiff has construed portions of Federal Defendants' Answers to Plaintiff's Interrogatories (filed October 2, 1978) and the NRC Staff Response to the Jeannine Honicker Petition for Emergency and Remedial Action (filed December 5, 1978, as an attachment to Federal Defendants' Supplemental Response to Motion for Expedited Consideration) to be the alleged admissions. Relevant excerpts of these documents demonstrate conclusively that plaintiff has misinterpreted defendants' statements.

In the interrogatories, the following questions were posed and responses given:

6. State with specificity the number of fatalities of cancer, which you expect to be caused by the continuing operation of the nuclear fuel cycle under your licenses

from October 2, 1978 to October 2, 1979.

The commission is not aware of any theory or experimental data that would enable it to make a specific prediction of the number of fatalities if any, which will result during the specified period from licensed fuel cycle activities. Furthermore, there is no conclusive evidence that ionizing radiation results in carcinogenic effects at the low dose rates produced by the nuclear fuel cycle. However, as part of the Commission's decision-making process and regulatory program, the NRC estimates the potential carcinogenic effect of radiation on populations by assuming that health effects due to low-level radiation are linearly proportional to the radiation dose. This assumption is known as the linear hypothesis, and is generally accepted by national and international scientific bodies for the purpose of estimating the possible health risks which might arise from exposure to low-level radiation. However, these estimates of potential risk cannot be identified as expected fatalities.

7. State with specificity the number of genetic effects which you expect to be caused by the continuing operation of the nuclear fuel cycle under your licenses from October 2, 1978 to October 2, 1979.

The above response to Question 6 applies to genetic effects.

8. State with specificity the number of other health effects which you expect to be caused by the continuing operation of the nuclear fuel cycle under your licenses from October 2, 1978 to October 2, 1979.

The above response to Question 6 applies to other health effects.

9. State whether or not you believe that some ionizing radiation escaping from the nuclear fuel cycle under your licenses from October 2, 1978 to October 2, 1979 will intrude onto or into the body of the plaintiff.

It is possible that plaintiff will receive a small radiation dose as a result of nuclear fuel cycle activities.

10. State whether or not you have adopted the linear hypothesis which states that any amount of ionizing radiation has an adverse effect on human health.

The Commission has adopted the linear hypothesis for purposes of licensing and policy decisions and setting regulatory standards. The Commission regulations require nuclear fuel cycle licensees to conduct their operations in a manner which limits the radiation dose to the public to be as low as reasonably achievable. 10 CFR 20.1(c). The linear hypothesis does not state that any amount of ionizing radiation has an adverse effect on human health. It is an assumption which permits a hypothetical estimation of potential risks at low radiation doses by extrapolating from actual risk data at much higher doses.

Federal Defendants' Answers to Plaintiff's Interrogatories at 3-5.  
In the NRC Staff Response to the Jeannine Honicker Petition, the following synopsis of the staff's position was presented:

It has not been scientifically established or proven that there are any health effects (risk) from the very low levels of human population radiation exposure (dose) that result from normal operation of the nuclear fuel cycle.

Nevertheless, in carrying out its responsibilities under the Atomic Energy Act of 1954, as amended, and the National Environmental Policy Act of 1969 (NEPA), the NRC assumes that some very low dose rate health effects can be extrapolated from data on health effects at very much higher dose rates, and it takes the prudent course of using standards for radiation protection based on this assumption.

Once the assumption is made that human health effects may occur at the very low radiation exposure

levels that do occur, one can, and the NRC staff does, calculate health effects for comparison and cost-benefit analysis purposes, and for assuring that the requirements of the regulations are met in licensing actions. Such health effects numbers should be recognized for what they are, namely, probabilities that the effects may occur in a very large population sample, and at sometime in the lifetime of the individuals in the exposed population.

NRC Staff Response to the Jeannine Honicker Petition at 1. This synopsis does not, of course, represent a position adopted by the NRC itself.

## APPENDIX B

### CONSTITUTIONAL PROVISIONS

ARTICLE I, Section 8: The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; ... To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

ARTICLE II, Section 3: ... (The President) shall take care that the laws be faithfully executed....

ARTICLE III, Section 2: The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;... (and) to controversies to which the United States shall be made a party....

ARTICLE IV, Section 2: The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States....

ARTICLE VI, Section 2: This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby....

AMENDMENT I: Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances.

AMENDMENT IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V: No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury... nor be deprived of life, liberty, or property, without due process of law....

AMENDMENT IX: The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

AMENDMENT X: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

AMENDMENT XIV: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws.

## TREATY PROVISIONS

### THE NUREMBERG PRINCIPLES

*U.N. General Assembly Res. 95 (I), GAOR Resolutions, 1946, International Law Commission Restatement, June-July, 1950.*

Principle III: The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.

Principle VI: The crimes hereinafter set out are punishable as crimes under international law:...

#### c. Crimes against humanity:

Murder, extermination, enslavement, deportation, and other inhuman acts done against any civilian population....

Principle VII: Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

### UNITED NATIONS UNIVERSAL DECLARATION OF HUMAN RIGHTS

*U.N. General Assembly Res. 217A (III), GAOR Resolutions (A/810), December 10, 1948, at 71-77*

Article 3: Everyone has the right to life, liberty, and the security of person.

### UNITED NATIONS INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

*U.N. General Assembly, Res. 2200 (XXI), 21 GAOR, Supp. No. 16 (A/6316), December 16, 1966, at 52-58.*

Article 6: Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Article 7: No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

### UNITED NATIONS INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

*U.N. General Assembly, Res. 2200 (XXI), 21 GAOR, Supp. No. 16 (A/6316) December 16, 1966, at 49-52.*

Article 12: 1. The States Parties to the present covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child.

(b) The improvement of all aspects of environmental and industrial hygiene.

(c) The prevention, treatment, and control of epidemic, endemic, occupational, and other diseases.

## THE HELSINKI AGREEMENT

*Signed August 1, 1975, Helsinki Finland, by 35 Nations.*

Article VII: ... The participating States will act in conformity with the purposes and principles of the Universal Declaration of Human Rights. They will also fulfill their obligations as set forth in the international declarations and agreements in this field....

## STATUTORY PROVISIONS

5 U.S.C. § 702: A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

28 U.S.C. § 1331 (a): The district courts shall have original jurisdiction in all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343 (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:...

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C. § 1361: The district courts shall have original jurisdiction of any action in the nature of mandamus to compel any officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. § 2342: The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or part), or to determine the validity of—...

(4) all final orders of the Atomic Energy Commission made reviewable by § 2239 of Title 42....

42 U.S.C. § 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured an an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 2011: Atomic energy is capable of application for peaceful as well as military purposes. It is therefore declared to be the policy of the United States that—

(a) the development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare, subject at all times to the paramount objective of making the maximum contribution to the common defense and security; and

(b) the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise.

42 U.S.C. § 2012: Congressional findings...

(e) Source and special nuclear materials, production facilities, and utilization facilities are affected with the public interest, and regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public.

42 U.S.C. §2201: In the performance of its functions the Commission is authorized to—...

(i) prescribe such regulations or orders as it may be necessary... (3) to govern any activity authorized pursuant to this Act, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property.

42 U.S.C. §2239 Hearings and judicial review.

(a) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees,... the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding....

(b) Any final order entered in any proceeding of the kind specified in subsection (a) of this section shall be the subject of judicial review in the manner prescribed in the Act of December 29, 1950, as amended, and to the provisions of section 10 of the Administrative Procedure Act.

10 C.F.R. §19.30: An injunction or other court order may be obtained prohibiting any violation of any provision of the Act or Title II of the Energy Reorganization Act of 1974, or any regulation or order issued thereunder.

10 C.F.R. §50.35: Issuance of construction permits.

(a) ...the Commission may issue a construction permit if the Commission finds that... (4) on the basis of the foregoing, there is reasonable assurance that (i) such safety questions will be satisfactorily resolved at or before the latest date stated in the application for completion of construction of the proposed facility, and (ii) taking into consideration the site criteria contained in part 100 of this chapter, the proposed facility can be constructed and operated at the proposed location without undue risk to the health and safety of the public....

(c) Any construction permit will be subject to the limitation that a license authorizing operation of the facility will not be issued by the Commission until... (2) the Commission has found that the final design provides reasonable assurance that the health and safety of the public will not be endangered by operation of the facility in accordance with the requirements of the license and the regulations in this chapter.

45 C.F.R. §46.109: Obligation to obtain informed consent; prohibition of exculpatory clauses.

Any institution proposing to place any subject at risk is obligated to obtain and document legally effective informed consent. No such informed consent, oral or written, obtained under an assurance provided pursuant to this part shall include any exculpatory language through which the subject is made to waive, or to appear to waive, any of his legal rights, including any release of the institution or its agents from liability for negligence.

## APPENDIX C

### IN THE DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE, TENNESSEE COMPLAINT

1. Jurisdiction for this action is founded upon the existence of a Federal question. The action arises under section 1983 of Title 42 of the Code of the United States (Civil Rights), section 1361 of Title 28 (Mandamus), and section 1331 of Title 28 (Constitution, laws, and treaties of the United States). The amount in controversy exceeds \$10,000.

2. Plaintiff is one person injured by the acts of the defendants. Plaintiff also enlists the aid of the District Court in protecting the lives and civil rights of citizens of the United States which are secured by the Constitution of the United States, and the lives and human rights of foreign nationals which are protected by treaty obligations of the United States.

3. Defendants are Commissioners of the Nuclear Regulatory Commission (NRC) established under the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§2011, 2201, and the Energy Reorganization Act of 1974, 42 U.S.C. §5841. Public safety and health is the first, last, and pre-eminent concern of the Commission under its enabling Acts and subsequent judicial rulings.

4. Acting under color of law, the defendants have engaged in a course of conduct which deprives the plaintiff of her rights, privileges, and immunities, and has deprived other human beings of their lives and physical integrity.

5. The Atomic Energy Act of 1954 makes clear that the intent of Congress in creating the Commission is to control nuclear power in order to improve the general welfare and to protect the common security, 42 U.S.C. §2011 (a) and (b). The Energy Reorganization Act of 1974 gives the Commission the specific mandate to protect the public health and safety from the hazards of nuclear power, 42 U.S.C. §2201 (i)(3) and (p), transferred to N.R.C. by 42 U.S.C. §5841(f).

6. On July 28, 1978, plaintiff petitioned the defendants under Title 10, chapter 2, of the Code of Federal Regulations, reminding the Commission of its duty to the public health. Plaintiff's petition showed that on the order of 100 deaths were caused by the defendants licensees each day that the nuclear fuel cycle continued. Proof was provided by the Commission's own staff documentation. The petition also showed that the Commission had consistently underestimated the magnitude of health effects of the nuclear fuel cycle by failure to use the best available data concerning the biological response to ionizing radiation and the most realistic estimates of population exposure from the existing fuel cycle. The

petition also showed that the response of the defendants when confronted with these admissions of wrongdoing was an attempt to justify the harm being inflicted.

7. Plaintiff's July 29, 1978 petition asked for emergency and remedial action within 30 days. This petition is appended hereto.

8. After 30 days of filing, the Commission has not taken the emergency action required of it in order to protect the public health and to save lives.

9. The defendants now stand in contravention to the Acts of the Congress of the United States, the U.S. Constitution, the rulings of the United States Supreme Court, and international obligations to human rights.

10. Under section 1361 of the Code of the United States (Mandamus), the court has the power to remedy the failure of the Federal defendants to regulate, monitor, and enforce the Acts of Congress intended to protect the public. This power is also conferred upon the court by Title 10, section 19.31, of the Code of Federal Regulations for these specific defendants.

11. A Federal agency which Congress has invested with regulatory power over the imposition of poisons to the general population may not set as a reasonable standard any which allows a large number of citizens to die, involuntarily, without due process.

12. A Federal agency may not deprive a citizen of his life without due process of law.

13. A Federal agency may not violate the purposes for which the United States was founded — insuring the domestic tranquility, promoting the general welfare, and securing these blessings to posterity — without express delegation of this power from the people.

14. A Federal agency may not, in the process of providing benefits to some citizens (electricity subscribers), place the cost of that benefit on other, involuntary bearers. The bearers of the unknown cost in poor health resulting from the nuclear fuel cycle will be primarily those:

- a. most medically susceptible, controlled to some extent by race, sex, and socioeconomic factors;
- b. those with the highest exposures, determined to some extent by geographic location, vocation, diet, and life-style; and
- c. future generations who have no present opportunity to defend their birthright.

15. This action or omission by the Commission described in paragraph 14 represents a violation of equal protection under the laws.

16. The Constitution secures, as against the government, the fundamental rights to breathe unpoisoned air, drink unpoisoned water, till unpoisoned soil, grow unpoisoned food, procreate undamaged children, and nurture them in a safe environment. This

has been declared to be a national policy by 42 U.S.C. §4321.

17. The plaintiff has rights, privileges, and immunities under the U.S. Constitution, and the laws and treaties of the United States, which are being violated by the Federal defendants. Violations of this kind are specifically prohibited and may be restrained under the Code of the United States, Title 42, section 1983 (Civil Rights), 28 U.S.C. §1331 (Constitution, laws, and treaties of the United States), and 28 U.S.C. §1361.

WHEREFORE, PLAINTIFF PRAYS FOR THE FOLLOWING RELIEF:

I. That the court order the permanent injunction of the U.S. Nuclear Regulatory Commission in the following specifics:

( 1) The Commission shall revoke the licenses of all nuclear fuel cycle facilities over which it holds jurisdiction.

( 2) The Commission shall take charge of all nuclear material, including uranium ore, fuel cycle process stages, and fission products, and safeguard them so as to minimize the future hazard;

( 3) The Commission shall continue to authorize efforts to isolate these dangerous materials from the biosphere;

( 4) The Commission shall isolate the tailings from mining, and enrichment facilities from the biosphere in such a manner as to neutralize the risk to future generations of fatal exposure or chronic health effects;

( 5) The Commission shall direct the exhumation of shallow land burial sites for nuclear materials and shall dispose of these materials in a manner consistent with its duty to the public health.

( 6) The Commission shall, in a safe and cautious fashion, order the decommissioning and dismantling of all existing facilities which handle fuel cycle materials, and isolate all hazardous radioactive materials from the biosphere.

( 7) The Commission shall issue such rules and orders as shall be required to maximally protect the public and occupational workers from all possible risks associated with exposure to radiation during transportation of materials to repositories. All persons engaged in the emergency clean-up should be beyond child-bearing age, should be informed of the risk, should be paid according to degree of hazardous work, and should receive complete medical care and future compensation. Non-human automated systems, now commercially available, are encouraged for use whenever practical.

( 8) The Commission shall order repayment to the plaintiff for all expenses incurred in bringing this matter to the attention of the commission and invoking the Commission's existing duty.

( 9) In all other ways possible, the Commission shall mitigate the damages and lessen the impact of the emergency conditions already created.

(10) The Commission shall begin substantial action at once by issuing orders or initiating proceedings which may be required to

address the emergency.

II. That the court issue a temporary restraining order requiring that the Commission comply with the first two of the above specifics at once, pending a full hearing on the complaint.

III. That a hearing be held to enable the court to issue a preliminary injunction requiring of the U.S. Nuclear Regulatory Commission all of the above specified relief, and that injunction issue.

IV. For all other relief that the court deems proper.

I swear that I have read the foregoing and that it is true and complete to the best of my knowledge, information and belief.

Signed this 6th day of September, 1978.

Jeannine Honicker

Plaintiff

362 Binkley Drive

Nashville, TN 37211

Joel Kachinsky

Attorney for the Plaintiff

FARM LEGAL

156 Drakes Lane

Summertown, TN 38483

COUNTY OF LEWIS  
STATE OF TENNESSEE

Sworn to and subscribed before me this 6th day of September, 1978.

Daniel Lloyd

NOTARY PUBLIC

My commission expires: 10-13-81

No. 79-710

Supreme Court, U. S.  
FILED

JAN 22 1980

MICHAEL RODAK, JR., CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1979

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JEANNINE HONICKER, PETITIONER

v.

JOSEPH M. HENDRIE, ET AL.

---

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SIXTH CIRCUIT

---

**BRIEF FOR THE RESPONDENTS  
IN OPPOSITION**

---

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**OPINIONS BELOW**

The order of the court of appeals (Pet. App. A-1) is reported at 605 F. 2d 556 (table). The opinion of the district court (Pet. App. A-2 to A-12) is reported at 465 F. Supp. 414.

**JURISDICTION**

The judgment of the court of appeals was entered on August 7, 1979. The petition for a writ of certiorari was filed on November 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether the court of appeals properly affirmed the district court's dismissal of petitioner's complaint on the grounds that petitioner had failed to exhaust her administrative remedies before the Nuclear Regulatory Commission, and that final Commission decisions are in any event reviewable exclusively in the courts of appeals.

### STATUTES INVOLVED

The relevant section of the Atomic Energy Act of 1954, Section 189, 42 U.S.C. 2239, is set forth at Pet. App. B-4. The relevant section of the Administrative Orders Review Act, 28 U.S.C. 2342(4), is set forth at Pet. App. B-3.

### STATEMENT

On July 29, 1978, petitioner filed a petition with the Nuclear Regulatory Commission to revoke the licenses of all nuclear plants and virtually all nuclear fuel cycle facilities, arguing that activities now licensed by the Commission are "inextricably intertwined with the release of deadly poisons to the biosphere," i.e., radioactive effluents, which she alleged caused cancer and other adverse health effects. Petitioner termed her 152-page request an emergency petition and called upon the Commission "to begin emergency and remedial action within 30 days." On August 30, 1978, the Commission informed petitioner that her submission would be considered a request to initiate license revocation proceedings under Commission regulations, and that appropriate action would be taken within a reasonable time (Pet. A-3, n.1; see 10 C.F.R. 2.206).

In view of the technical complexity of the issues raised by the petition and the necessity of consulting its technical staff, the Commission refused to handle the petition on an emergency basis (Pet. A-3).<sup>1</sup>

After reviewing the response of its technical staff to the petition, the Commission concluded that the petition in fact constituted a challenge to the adequacy of the NRC's regulations and licensing standards, and was reviewable under 10 C.F.R. 2.802. Pet. App. A-3 n.1. The petition is currently pending before the Commission (Pet. App. A-3).

Before her administrative claim could be decided, petitioner filed a complaint in the instant case in the United States District Court for the Middle District of Tennessee, which incorporated her pending administrative petition. The complaint sought, among other things, an order directing the Commission to revoke the licenses of all facilities over which the Commission has jurisdiction. The district court denied petitioner's motion for a temporary restraining order.<sup>2</sup> On January 12, 1979,

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<sup>1</sup>On November 6, 1978, petitioner sought review in the United States Court of Appeals for the District of Columbia Circuit of the NRC's September 7 letter denying emergency action. On December 21, the court of appeals, *sua sponte*, dismissed that petition on jurisdictional grounds, finding that the letter was not a final order for purposes of judicial review and that, even if it were, the court would have deferred to the "Commission's discretion and greater expertise on such questions of 'interim relief.'" *Honicker v. NRC*, 590 F. 2d 1207, 1209 (D.C. Cir. 1978), cert. denied, 441 U.S. 906 (1979).

<sup>2</sup>Petitioner appealed the district court's denial of a temporary restraining order to the Sixth Circuit. Not receiving an immediate decision, she brought her request to this Court. Mr. Justice Stewart denied her request on September 14, 1978. Subsequently, the Sixth Circuit denied emergency relief on November 6, 1978. *Honicker v. Hendrie, et al.*, No. 78-1405.

following an evidentiary hearing on her application for a preliminary injunction, the district court dismissed the complaint for lack of subject matter jurisdiction (Pet. App. A-2 to A-9).

The district court rested its determination on several independent grounds. First the court noted that the Commission's technical expertise was necessary to determine whether the nuclear fuel cycle created the hazards alleged by petitioner<sup>3</sup> and that petitioner had therefore failed to exhaust her administrative remedies under the Commission's regulations. Pet. App. A-3 to A-5. Second, the court held that, even if petitioner had exhausted her remedies, review of the Commission's actions is vested exclusively in the court of appeals under 42 U.S.C. 2239 and 28 U.S.C. 2342(4). Pet App. A-5 to A-6. Third, the court found that, given the nature of the scientific controversy on the issues petitioner raised, the doctrine of primary jurisdiction was "particularly appropriate" and precluded petitioner from seeking relief initially in the courts rather than before the Commission. Pet. App. A-6 to A-7. In reaching these determinations, the district court expressly found that, contrary to petitioner's contention, the Commission had not admitted that the nuclear fuel cycle presents an imminent threat to petitioner's health. Pet. App. A-8 to A-9.

After briefing and argument, the court of appeals affirmed the district court's order of dismissal "[f]or the reasons set forth in the district court's thorough and well-reasoned memorandum opinion" (Pet. App. A-1).

<sup>3</sup>At the evidentiary hearing on the preliminary injunction, petitioner admitted that there was a divergence of scientific opinion regarding the relation between radiation doses in human beings and the probability of cancer or other adverse health effects. Pet. App. A-7 n.5.

## ARGUMENT

In its well reasoned opinion upon which we rely, the district court applied the established principle that, barring extraordinary circumstances not present here, parties may not seek judicial relief prior to exhausting their administrative remedies. The court also followed the rule that, when a statute calls for direct appellate review of final agency decisions, district courts do not have independent jurisdiction to review such decisions. The court of appeals affirmed these holdings, and further review by this Court is not warranted.

Under both the Atomic Energy Act of 1954, 42 U.S.C. 2239(a), and the regulations of the NRC, 10 C.F.R. 2.200-2.206 and 10 C.F.R. 2.802, "any person" may initiate Commission proceedings to revoke the licenses of nuclear fuel cycle licensees, or to issue or modify NRC regulations. Exhaustion of these administrative remedies is a prerequisite to the filing of any judicial proceeding. See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). The need for exhaustion is particularly strong "where the function of the agency and the particular decision sought to be reviewed involve exercise of discretionary powers granted the agency by Congress, or require application of special expertise." *McKart v. United States*, 395 U.S. 185, 194 (1969); *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68-69 (1970). Both factors are present here.

With respect to the need for special knowledge to resolve the underlying dispute, the district court stated (Pet. App. A-7; footnote omitted):

Determination of a highly complex and controversial question of nuclear science, the effect on human health of the low level radiation exposure allegedly produced by the ordinary operation of the nuclear

fuel cycle, would be crucial to an adjudication in this case. Certainly, expertise in the field of nuclear science would facilitate such a determination. The NRC possesses this expertise; the court does not.

Similarly, the district court concluded (Pet. App. A-8) that resolution of the dispute "implicates fundamental questions of national policy concerning the development of nuclear energy," matters which involve the exercise of considerable discretion.

This observation accords with the conclusion reached by this Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 557-558 (1978; emphasis in original):

Nuclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action. Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment.

The district court correctly ruled that none of the exceptions to the exhaustion doctrine is available in this case. See Pet. App. A-4 to A-5; 3 K. Davis, *Administrative Law Treatise* § 20.03, at 69 (1958). Petitioner did not challenge the constitutionality of the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*) or the Energy Reorganization Act of 1974 (42 U.S.C. 5841 *et seq.*), which authorize the Commission to regulate

nuclear fuel cycle activities. Nor does the case present purely legal questions; on the contrary, it requires resolution of highly complex technical issues. See Pet. App. A-7 & n.5. Finally, the court rejected petitioner's contention that irreparable harm would result if nuclear fuel cycle activities were not immediately halted. Pet. App. A-8 to A-9. Under the circumstances, exhaustion of administrative remedies is mandatory.

Even had petitioner exhausted her administrative remedies, the district court would not have had jurisdiction to entertain her case. The pertinent judicial review statutes, 28 U.S.C. 2342(4) and 42 U.S.C. 2239(b), provide that the court of appeals has exclusive jurisdiction to review final orders of the Commission. There is no concurrent jurisdiction in the district court.<sup>4</sup>

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<sup>4</sup>Petitioner's reliance on alternative jurisdictional statutes (Pet. 16-20) is misplaced. The federal question and mandamus jurisdictional statutes, 28 U.S.C. 1331 and 28 U.S.C. 1361, are in the present case supplanted by the doctrines of primary jurisdiction and exhaustion of administrative remedies, together with the provisions for court of appeals review of agency action. Furthermore, with regard to 28 U.S.C. 1361, the total shutdown of the nuclear fuel cycle requested by petitioner cannot reasonably be characterized as a non-discretionary ministerial duty of the type to which the mandamus statute applies. The civil rights statutes (28 U.S.C. 1343 and 42 U.S.C. 1983) are inapplicable because respondents do not act under color of state law. Similarly, petitioner has not demonstrated that the actions of which she complains are in violation of non-discretionary legal duties and that resort to the administrative process would be futile. See *Concerned Citizens of Rhode Island v. NRC*, 430 F. Supp. 627 (D. R.I. 1977).

**CONCLUSION**

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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JANUARY 1980